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No. 05-1466

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SUPREME COURT, U.S.

In the Supreme Court of the United States

UNITED HEALTHCARE OF OHIO, INC.,
Petitioner,

v.

NORTHERN KENTUCKY MEDICAL SOCIETY, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Kentucky Court of Appeals properly stated the test common to both Kentucky state law and federal law under the Federal Arbitration Act to determine whether a claim falls within an agreement to arbitrate.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves claims by Respondents The Academy of Medicine of Cincinnati, A. Lee Greiner, M.D., Raymond Will, M.D., Victor Schmelzer, M.D., Karl S. Ulicny, Jr., M.D., E. Douglas Baldridge, M.D., P. Scott Becker, M.D. and The Northern Kentucky Medical Society (collectively "Respondents") that Petitioner United Healthcare of Ohio, Inc. ("Petitioner" or "United Healthcare"), along with Humana, Inc., Anthem Blue Cross and Blue Shield and Aetna Health, Inc., which control approximately 92 percent of greater Cincinnati's HMO enrollment market, (the "Region"), engaged in a conspiracy to maintain artificially low reimbursement rates paid to physicians in the Region in violation of K.R.S. §§367.175, *et. seq.*, Kentucky's antitrust statute.[1] The antitrust claims alleged by Respondents *predate* and have nothing to do with the current provider contracts which relate to the payment of individual claims and contain the arbitration clauses at issue in this appeal.

It is a fundamental tenet of both Kentucky and federal law that a party may not be compelled to submit to arbitration any dispute he has not agreed to so submit. However, that is

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[1] The original complaint also alleged claims against Defendants Humana, Inc., Aetna Health, Inc. and Anthem Blue Cross and Blue Shield. However, each of these parties have settled these claims. As part of those settlements, each insurance company agreed to increase the total annual reimbursements paid to physicians in the Region and undertake other measures to either monitor future negotiations with physician groups and physician organizations in the Region or fund efforts to enhance physician recruitment and retention in the Region.

precisely what Petitioner seeks to have this Court do in seeking a writ of certiorari under the guise that an improper standard of arbitrability has been applied. In support of this argument, Petitioner claims that there is a "growing trend" of state courts concluding that claims are not arbitrable despite broad arbitration clauses; however, the only two decisions referenced by Petitioner are those in this case and its companion case pending in a state court in Ohio.[2] All of the parties in this appeal agree that arbitration is a matter of contract, and the trial court and Kentucky Court of Appeals concluded that Respondents' statutory antitrust claims fall outside of the scope of the arbitration clauses at issue in this litigation. The Kentucky Supreme Court declined to grant discretionary review of the decision of the Kentucky Court of Appeals. Petitioner has not in its argument in support of its petition for a writ of certiorari made any new or compelling arguments which support review by this Court.

This case was filed by Respondents, on behalf of the more than 2,000 physicians in the Region, in June 2002 in Boone Circuit Court in the Commonwealth of Kentucky. The suit alleges that the dominant insurance companies in the Region engaged in anticompetitive behavior, which has had a devastating impact on the availability of quality medical care in the Region. The reimbursement rates paid to doctors in the Region are approximately 30% below the market average paid for the same services in Columbus, Ohio, Indianapolis, Indiana, and Lexington, Kentucky. Petitioner's illegal conduct has resulted in fewer hospitals, fewer physicians, a deficit of health care, a lack of necessary trauma centers, fewer

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[2] *United Healthcare of Ohio, Inc. v. Academy of Medicine of Cincinnati*, Case No. 05-1465, pending in this Court on a petition for a writ of certiorari to the Supreme Court of Ohio.

innovative procedures available to patients in the Region, and a decrease in physician pay by an average of nearly 30%. In fact, in the areas of reimbursement rates for new patients, established patients, inpatient and outpatient consultations, hospital admissions, subsequent hospital care visits and hospital discharges, in the Region not only ranked last, but *below* the market average.

Petitioner's actions have also caused a decrease in the number of hospitals in the Region, despite an increasing population in the Region. At the same time, Petitioner's profits have grown substantially. As Petitioner continued to engage in anticompetitive behavior, its profits grew while the number of doctors and quality of care declined in the Region. For example, in the first half of 2001, United Healthcare's earnings were up 25% to $435 million on revenues of $11.5 billion.

Despite the fact that Respondents' claims arise independently of the provider agreements entered into between some Respondent physicians in the Region and Petitioner, shortly after Respondents filed their Complaint, each Defendant filed separate motions to compel the antitrust claims to arbitration. Petitioner's arguments have been rejected at each level below. Accordingly, this Court should deny Petitioner's request for a writ as it does not merit review.

REASONS FOR DENYING THE PETITION

This matter does not involve novel or unresolved issues regarding the test courts should apply under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, to determine if a claim is subject to arbitration. Nor does this matter involve a split among any courts regarding the appropriate

test to apply under the FAA. Rather, this matter merely involves traditional principles of contract interpretation. Petitioner does not like the decisions rendered by the two Kentucky courts and separately by the three Ohio courts which determined that the claims did not fall within the arbitration provisions. However, an alleged misapplication of the test, properly set forth by the Kentucky Court of Appeals to the facts and contract provision at issue in this case, is not a compelling reason to grant certiorari. *See* Sup. Ct. R. 10.

I. Kentucky Courts Have Properly Stated the Rules of Law Applicable Under Federal and Kentucky State Law to Determine if a Claim is Within an Agreement to Arbitrate.

A. There is No Conflict Between the Kentucky Court of Appeals and the United States Courts of Appeals Regarding the Appropriate Principles of Law Applicable Under Federal Law to Determine If a Claim is Arbitrable.

The Question Presented by Petitioner does not accurately reflect the Kentucky Court of Appeals' statement or application of the test, common to both Kentucky state courts and federal courts, for determining whether a claim falls within an agreement to arbitrate. Contrary to Petitioner's suggestion, the Kentucky Court of Appeals accurately stated the rule of law applicable under both Kentucky law and the FAA for determining whether a claim is arbitrable.

Petitioners distort the holdings below by asserting that the test adopted by the Kentucky Court of Appeals for determining if a claim is within the scope of the parties' arbitration agreement "considers only whether the elements of [the statutory and tort] claims reference the parties'

contract." (Petition for Writ of Certiorari, at p. i.) Rather, the Kentucky Court of Appeals correctly stated the relevant rules of law that guide determinations of arbitrability. *Anthem Health Plans of Ky., Inc. v. Acad. of Medicine of Cincinnati*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR (Ky. App. Oct. 29, 2004), review denied *Anthem Health Plans of Ky., Inc. v. Baldridge*, No. 2005-SC-0109-D (Ky. Feb. 15, 2006).

The Kentucky Court of Appeals first recognized that both the FAA and state law provide that arbitration is to be favored by the law, and arbitration agreements are to be enforced in accordance with the same standards applied to other contracts. *Id.* at 1-2. The court then properly set forth the fundamental and paramount rule of law applicable to determinations of arbitrability under both the FAA and Kentucky state law: "A party cannot be required to submit to arbitration unless both parties have agreed that the dispute be arbitrated." *Id.* at 3. This fundamental rule of law is the same one adopted by this Court in *AT & T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986), for determining the arbitrability of claims, and it remains the law today.

Kentucky courts have consistently and properly set forth the rules of law applicable to determinations of arbitrability. Kentucky's Uniform Arbitration Act ("UAA") embodies the same principles, and largely mirrors, the FAA. KRS §§ 417.045, *et seq.*; *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 854 (Ky. 2004). Application of the Kentucky UAA and the FAA by Kentucky courts is consistent with federal law, and advances the pro-arbitration goals of both the state and federal Acts. *See, e.g., Louisville Peterbilt, Inc.*, 132 S.W.3d at 854-55; *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 339 (Ky.App. 2001); *Hill v. Hilliard*, 945 S.W.2d 948, 951 (Ky.App. 1996); *Valley*

Const. Co., Inc. v. Perry Host Management Co., Inc., 796 S.W.2d 365, 366, 367 (Ky.App. 1990).

Like the Kentucky Court of Appeals in this case, relying upon federal law, Kentucky courts have repeatedly recognized that arbitration agreements are a matter of contract, and are interpreted according to state law. *See, e.g., Oakwood Mobile Homes, Inc. v. Sprowls*, 82 S.W.3d 193, 195 (Ky. 2002) (citing *AT & T Technologies, Inc.*, 475 U.S. 643, and *Perry v. Thomas*, 482 U.S. 483 (1987)). Consistent with this Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), Kentucky courts recognize that the "first task of a court asked to compel arbitration is to determine whether the parties agreed to arbitrate that dispute." *Oakwood Mobile Homes, Inc.*, 82 S.W.3d at 195. (quoting *Mitsubishi*, 473 U.S. at 626).

Further, Kentucky courts have specifically recognized that statutory claims can properly be compelled to arbitration to the same extent as other disputes as long as there is no legal constraint to arbitration, such as a constraint set forth in the statute or legislative history. *See Oakwood Mobile Homes, Inc.*, 82 S.W.3d at 194; *Hill*, 945 S.W.2d at 951; *Conseco Finance Servicing Corp.*, 47 S.W.3d at 339. The Kentucky Court of Appeals specifically recognized in this case that this Court had opened the door for federal courts to hold that domestic anti-trust claims could be arbitrated in *Mitsubishi*. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at 2-3.

There is no dispute between Kentucky courts and the federal Courts of Appeals regarding the applicability of these principles to questions of arbitrability under federal law. *See, e.g., Air Line Pilots Ass'n v. Federal Express Corp.*, 402

F.3d 1245, 1248 (D.C. Cir. 2005); *Municipality of San Juan v. Corporacion Para El Fomento Economico De La Ciudad Capital*, 415 F.3d 145, 149 (1st Cir. 2005); *Alliance Bernstein Inv. Research and Management, Inc. v. Schaffran*, 445 F.3d 121, 125 (2d Cir. 2006); *Medtronic AVE Inc. v. Cordis Corp.*, 100 Fed.Appx. 865, 866-67 (3d Cir. 2004); *East Coast Hockey League, Inc. v. Professional Hockey Players Ass'n*, 322 F.3d 311, 314 (4th Cir. 2003); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 752 (5th Cir. 1995); *Cleveland Elec. Illuminating Co. v. Utility Workers Union of America*, 440 F.3d 809, 813 (6th Cir. 2006); *Local Union 1393 Intern. Broth. of Elec. Workers, AFL-CIO v. Utilities Dist. of Western Indiana Rural Elec. Membership Co-op.*, 167 F.3d 1181, 1183-84 (7th Cir. 1999); *Kansas City Southern Transport Co., Inc. v. Teamsters Local Union #41*, 126 F.3d 1059, 1067 (8th Cir. 1997); *Carpenters 46 Northern California Counties Conference Bd. v. Zcon Builders*, 96 F.3d 410, 414 (9th Cir. 1996); *Oil, Chemical and Atomic Workers Intern. Union Local 5-391 v. Conoco, Inc.*, 64 Fed.Appx. 178, 181 (10th Cir. 2003); *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 827 F.2d 709, 712 (11th Cir. 1987).

Since the Kentucky Court of Appeals properly stated the applicable rules of law under federal law, this Court should deny Petitioner's request for a writ of certiorari.

B. The Method of Analysis Approved by the Kentucky Court of Appeals to Determine Whether Parties Agreed to Submit a Dispute to Arbitration is Consistent With Federal Law

The Kentucky Court of Appeals in applying the appropriate analysis concluded that the parties had not agreed to arbitrate this dispute, and held that "the antitrust claims alleged are simply outside the scope of the arbitration

agreements." *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at 3. In doing so, the Kentucky Court of Appeals adopted the reasoning of the Ohio appellate court who had considered the identical claim, facts, and arbitration agreement, and whose decision was ultimately adopted by the Ohio Supreme Court. *Id.* at 3; *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 800 N.E.2d 1185, 1187 (Ohio Ct. App. 2003); *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 842 N.E.2d 488, 494 (Ohio 2006).

In analyzing the scope of the arbitration agreement, the Ohio Court of Appeals adopted the test enunciated by the Sixth Circuit Court of Appeals in *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 395 (6th Cir. 2003), and stated:

> In determining whether this claim was within the scope of the arbitration agreements, "[a] proper method of analysis here is to ask [whether this] action could be maintained without reference to the [provider agreement] or [business] relationship at issue. If it could, it is likely outside the scope of the arbitration agreement." *Academy of Medicine of Cincinnati*, 800 N.E.2d at 1187 (internal citation omitted).

The Kentucky Court of Appeals adopted this reasoning. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at 3-4.

Petitioner's attack of the Kentucky Court of Appeal's decision is largely based upon a misreading of the decision. First, in an effort to characterize the opinion as constrictive and hostile to arbitration, Petitioner misstates the test approved by the Kentucky appellate court by asserting that the court "insist[s] that elements of claims reference parties'

underlying contracts as a prerequisite to compelling arbitration under the FAA." (Petition for Writ of Certiorari, at p. 9.) In reality, the Kentucky Court of Appeals merely stated that when determining whether a cause of action is within the scope of an arbitration agreement, a proper method of analysis is to ask if the action could be maintained without reference to the agreement or relationship at issue. If so, the Kentucky Court of Appeals does not state that a court must then find the action outside the arbitration agreement. Rather, it states that the action is *likely* outside the scope. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at 3-4. In other words, the test is helpful in analyzing the scope of the arbitration clause, but does not establish a per se rule. *See Id.* The court, therefore, approved the use of this method of analysis, but did not require courts to do so, preclude other methods of analysis, or insist that the elements of the claim reference the contract to be within the scope of the arbitration agreement.

Nor did the Kentucky Court of Appeals create a distinct test applicable to statutory or tort claims, or render non-arbitrable all tort and statutory causes of action, as Petitioner suggests. In fact, the opposite is true. The court recognized that this Court had opened the door to the arbitrability of domestic antitrust claims in *Mitsubishi*. *Id.* at pp. 2-3. Other Kentucky courts have expressly found that statutory claims could be compelled to arbitration. *See Oakwood Mobile Homes, Inc.*, 82 S.W.3d at 194; *Hill*, 945 S.W.2d at 951; *Conseco Finance Servicing Corp.*, 47 S.W.3d at 339. The Kentucky Court of Appeals did not reach the question of whether there were any legal constraints to arbitrating Kentucky state law antitrust claims because it determined, based upon traditional contract interpretation principles, that the claim was simply outside the scope of the arbitration

clause. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at p. 3.

In adopting the reasoning of the Ohio appellate court, the Kentucky Court of Appeals recognized that the proper focus of any inquiry is the substantive allegations of the complaint, rather than the labels attached to the causes of action. *See Id.* at pp. 3-4. The "contract reference" test approved by the Kentucky Court of Appeals is one method that can be used to analyze the substantive factual allegations. The argument advanced by Petitioner erroneously assumes that only one method of analysis, *i.e.*, the "touch matters" or "contract reference" method, may properly be applied to the complaint's factual allegations by a court when determining the scope of an agreement to arbitrate. However, asking whether the allegations underlying the claims "touch matters" covered by the arbitration agreement is no different than asking whether a claim can be "maintained without reference to the contract or relationship." Both questions seek to determine the scope of the arbitration clause by analyzing whether the asserted claims and facts underlying those claims arise independently of the agreement to arbitrate. Both focus upon the factual allegations, rather than the labels given to the causes of action. As demonstrated by the Sixth Circuit in *Fazio*, the tests are not mutually exclusive, but, rather, complement each other.

> District courts have the authority to decide, as a threshold matter, whether an issue is within the scope of an arbitration agreement. *Stout*, 228 F.3d at 714. **A proper method of analysis here is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration**

agreement. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 250-51 (5th Cir.1998) (applying Texas arbitration law under a choice of law provision). Torts may often fall into this category, but merely casting a complaint in tort does not mean that the arbitration provision does not apply. *Fyrnetics (Hong Kong) Ltd. v. Quantum Group, Inc.*, 293 F.3d 1023, 1030 (7th Cir.2002). **Even real torts can be covered by arbitration clauses "[i]f the allegations underlying the claims 'touch matters' covered by the [agreement]."** *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir.1987). We are, however, aware of the Supreme Court's warning against "forc[ing] unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945, 115 S.Ct. 1920. *Fazio*, 340 F.3d at 395 (emphasis added); *see also Deputy v. Lehman Brothers Inc.*, 2004 WL 3770574, 4 (E.D.Wis. 2004) (adopting test set forth in *Fazio*); *see also Service Corp. Intern. v. Lopez* , 162 S.W.3d 801, 810 (Tex. App. 2005) (demonstrating further the complementary nature of the "touch matters" and "contract reference" approaches).

Neither this Court, nor any other Court of Appeals, has indicated that these methods of analysis are mutually exclusive, that the "touch matters" test is the exclusive method of analysis, or that the "contract reference" method is inappropriate. Contrary to Petitioner's suggestion, this Court did not establish the "touch matters" test as the exclusive method for analyzing the scope of an arbitration clause in *Mitsubishi.*, 473 U.S. at 625 fn.13. Rather, this Court used the phrase "touch matters" in a footnote while examining the claim at issue in *Mitsubishi*:

> Soler does suggest that, because the title of the clause referred only to "certain matters," App. 52, and the clause itself specifically referred only to "Articles I-B through V," *ibid.*, it should be read narrowly to exclude the statutory claims. Soler ignores the inclusion within those "certain matters" of "[a]ll disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to [the specified provisions] or for the breach thereof." Contrary to Soler's suggestion, the exclusion of some areas of possible dispute from the scope of an arbitration clause does not serve to restrict the reach of an otherwise broad clause in the areas in which it was intended to operate. Thus, insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability. *Id.*

If this Court's footnote were given the broad reach urged by Petitioner, the traditional principles of contract interpretation that this Court has instructed courts to apply, *First Options of Chicago, Inc v. Kaplan,* 514 U.S. 938, 944 (1995), *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 60-63 (1995), would be effectively eviscerated. *See Alticor, Inc. v. National Union Fire Ins. Co.*, 411 F.3d 669, 673 (6th Cir. 2005) (rejecting appellant's reliance upon the United States Supreme Court's footnote in *Mitsubishi* to argue that dispute should be compelled to arbitration because it "touches matters" covered by arbitration agreement, stating that appellant "reads this passing comment out of context, and we do not believe the words have the broad impact [appellant] would give them"). Indeed, Petitioner cites no authority which states that only the "touch matters" method of analysis is correct or that the "contract reference" method is incorrect.

Most important, the Kentucky Court of Appeal's approach is consistent with the principles set forth under federal law and advances the federal policy favoring arbitration where appropriate. Consistent with directives from this Court and federal Courts of Appeals, by adopting the reasoning of the Ohio appellate court, the Kentucky Court of Appeals properly recognized that determinations of arbitrability must be based upon the factual allegations in the complaint, rather than the legal theories presented. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at pp. 3-4. There is no dispute among the Kentucky Court of Appeals and the federal Courts of Appeals on this point.

Petitioner mischaracterizes the Kentucky Court of Appeals' holding by suggesting that the test is based upon artful pleading rather than the underlying factual allegations. (Petition for Writ of Certiorari, at p. 14.) The test approved by the court is not whether the *complaint* references the arbitration agreement, as Petitioner states. (*Id.*) Rather, it is whether "the action could be maintained without reference to the contract or relationship at issue." *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at pp. 3-4. Consistent with federal law, the test appropriately looks to the substance of the factual allegations rather than the legal theories presented.

II. The Kentucky Court of Appeals Correctly Applied the Test of Arbitrability to the Agreements, Facts, and Claims Involved in this Case

A. Arbitrability is a Matter of Contract, and the Kentucky Courts Applied Traditional Contract Principles in Making Their Determination

Petitioner's emphasis upon the federal policy favoring arbitration loses sight of the fact that arbitrability is a matter of contract interpretation, and a fundamental tenet of federal law is that a party cannot be compelled to submit to arbitration any dispute which he has not agreed to so submit. *AT&T Technologies, Inc.*, 475 U.S. at 648-49. As this Court has recognized, "[t]he overarching issue is whether the parties agreed to arbitrate the issue." *Mitsubishi,* 473 U.S. at 626; *see also Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at p. 3 ("A party cannot be required to submit to arbitration unless both parties have agreed that the dispute be arbitrated.") Although federal law favors arbitration, the intent of the contracting parties is paramount and can trump the FAA's policy in favor of arbitration.

> The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it "does not require parties to arbitrate when they have not agreed to do so." . . . Because the FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement. *Id.*, at 626, 105 S.Ct. 3346.

> While ambiguities in the language of the agreement should be resolved in favor of arbitration, . . . we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated. "Arbitration under the [FAA] is a matter of consent, not coercion." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002) (some internal citations omitted); *see also Mastrobuono*, 514 U.S. at 57.

Further, simply because parties have a contract relating to certain matters does not mean that every dispute that arises between them will be subject to arbitration. The FAA places arbitration agreements on equal footing with other contracts, but not greater footing.

> Nothing in the Federal Arbitration Act overrides normal rules of contractual interpretation; the Act's goal was to put arbitration on a par with other contracts and eliminate any vestige of old rules disfavoring arbitration. Arbitration depends on agreement, see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986), and nothing beats normal rules of contract law to determine what the parties' agreement entails. There is no denying that many decisions proclaim that federal policy favors arbitration, but this differs from saying that courts read contracts to foist arbitration on parties who have not genuinely agreed to that device. *Stone v. Doerge*, 328 F.3d 343, 345 (7th Cir. 2003) (holding that arbitration agreement between trusts and clearing

broker did not require arbitration of trustee's fraud claim against broker).

When deciding whether the parties agreed to arbitrate a dispute, courts are to apply traditional state-law principles that govern the formation and interpretation of contracts. *First Options of Chicago, Inc,* 514 U.S. at 944; *Mastrobuono,* 514 U.S. at 60-63. Because arbitration is a matter of contract, it goes without saying that parties to a lawsuit who were not parties to the arbitration agreement cannot be compelled to arbitrate their claims. *Waffle House, Inc.*, 534 U.S. at 294 (stating that "[i]t goes without saying that a contract cannot bind a nonparty," and holding that claim brought by EEOC, a non-party to the contract containing the arbitration provision, on behalf of employees who were parties to the contract, was not subject to arbitration); *General Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242, 247 (5th Cir. 1998) (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)) ("Unless required by statute, a person who is not a party to a pre-dispute contract to arbitrate cannot be compelled to submit a dispute to arbitration."). Two of the plaintiffs in this action are medical societies. Because the medical societies were not signatories to the agreements containing the arbitration clauses, their claims are not subject to the FAA and cannot be compelled to arbitration or stayed.

Similarly, the Kentucky courts correctly determined that the physicians' claims should not be compelled to arbitration because the state law anti-trust claim alleged is not within the scope of the arbitration agreement. "[I]t is the language of the contract that defines the scope of disputes subject to arbitration." *Waffle House, Inc.*, 534 U.S. at 289. The Kentucky and Ohio courts who reviewed the arbitration agreements at issue examined the factual allegations and the

language of the agreements and applied traditional contract principles. Every one of the courts determined that the state anti-trust claim alleged by Respondents was not within the scope of the arbitration agreement.

The provider agreements which contained the arbitration provision were entered into between individual physicians and Petitioner United Healthcare (and the three other insurance companies who were named as defendants and who have since settled their claims). The agreements established a fee schedule for reimbursement by Petitioner of the physicians for certain medical procedures. The arbitration provision requires the parties to the agreement to arbitrate disputes relating to their "business relationship." The dispute at issue here, however, centers on whether Petitioner illegally conspired or colluded with other insurance companies to set reimbursement rates in the region lower than the prevailing rates in comparable health care markets.

The Kentucky Court of Appeals recognized that both Kentucky and federal law favors arbitration to settle disputes. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at pp. 1-2. However, it also recognized that arbitrability is a matter of contract, and affirmed the trial court's determination that the dispute was not within the scope of the agreement to arbitrate. *Id.* at p. 3. Adopting the reasoning of the Ohio appellate court, the Kentucky Court of Appeals found:

> Here, the parties' dispute centers on whether the HMOs conspired and/or colluded to set reimbursement rates in this region that were lower than the "prevailing reimbursement rates in other comparable Ohio helath care markets such as Dayton, Columbus and Cleveland."

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> After reviewing the complaint and the remainder of the record, we conclude that the doctors' antitrust claim could be maintained without reference to their individual provider agreements.
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> The doctors' allegations in their complaint (1) that the HMOs conspired and/or colluded with one another to illegally lower and fix the reimbursement rates for medical procedures to medical practitioners in the region; (2) that the anticompetitive behavior caused a decline in the number of doctors willing to practice medicine here, which resulted in the number of hospitals and hospital beds available for patient care dropping by nearly 50 percent and a decline in the quality of health care available to the consumer; and (3) that the HMOs' anticompetitive behavior precipitated a drop in physicians' salaries in the area neither relied on nor referred to a contract or a provider agreement between the doctors and the HMOs. Instead, the antitrust claim was based upon a statutory remedy the legislature has provided to persons harmed by illegal price fixing . . . . *Id.* at pp. 3-4 (quoting *Academy of Medicine of Cincinnati*, 800 N.E.2d at 1187).

Simply because the physicians and insurance companies agreed to a fee schedule and agreed to arbitrate disputes concerning their "business relationship" does not mean that the physicians agreed to arbitrate disputes alleging an illegal conspiracy among insurance companies with regard to artificial capping of reimbursement rates, to which Respondents have been victims. This is not a dispute about the business relationship between the physicians and Petitioner. The dispute concerns the illegal agreement among

insurance companies in the Region. The allegations of an agreement among insurance companies to fix prices arose out of the conduct of the insurance companies before the provider agreements containing the arbitration provision were even executed. The anti-competitive behavior alleged by Respondents predates and has nothing to do with the current provider contracts which relate to the payment of individual claims and contain the arbitration clauses at issue in this appeal. The anti-trust claims arise independently of the provider agreements.

There's a reason every court in Kentucky and Ohio in this case who has considered this issue has determined that the dispute is not within the scope of arbitration clause, and it is not because the courts are hostile to arbitration as Petitioner asserts. In fact, the Kentucky Court of Appeals expressly stated that both Kentucky and federal courts favor arbitration. *Id.* at pp. 1-2. Rather, it is because, after examining the specific factual allegations of the complaint and the language of the arbitration clause at issue, the courts have applied standard contract principles and determined that this dispute is not within the scope of the arbitration clauses. The result is the same whether a court applies the "contract reference" or "touch matters" test.

Petitioner is wrong to rely primarily on the favored status of arbitration as the basis to obtain this Court's review of the Kentucky Court of Appeals' decision. The Kentucky Court of Appeals and trial court correctly interpreted the contract provision at issue in light of the factual allegations. The medical societies who were not parties to the arbitration agreement cannot be compelled to arbitrate their claims. Further, applying traditional principles of contract interpretation, this dispute is simply not within the scope of the arbitration agreement.

B. The Determination of Whether An Anti-Trust Claim is Arbitrable Depends Upon the Specific Facts and Contract Language At Issue, and Neither the United States Supreme Court, Nor the Kentucky Court of Appeals, Has Made Anti-Trust Claims Per Se Arbitrable

The determination of whether a claim is within the scope of an arbitration agreement is driven by an analysis of the factual allegations made in the complaint and the court's application of state law principles of contract interpretation. Because the determination is dependent upon the specific facts alleged and the specific contract language at issue, it is impossible to create per se rules with respect to arbitrability. The facts and contract language will differ in every case, creating the likelihood of differing results.

In *Mitsubishi,* this Court considered the arbitrability of a federal anti-trust claim in the context of an international transaction. *Mitsubishi*, 473 U.S. 614. The petitioner relied upon both the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is seeking to compel arbitration of the dispute. *Id.* at 614. In its decision, this Court did not undertake its own analysis of the scope of the arbitration language at issue. Plaintiff had not appealed the lower court's determination that the antitrust claim implicated the arbitration agreement. Rather, the Court considered whether the federal anti-trust claim was nonarbitrable due to legal constraints or policy considerations even though the parties had agreed to arbitrate such claims. *Id.* at 628-29.

This Court first held that there was no reason to carve statutory claims out as inappropriate for arbitration. *Id.* at 626. They are subject to the same rules of contract

interpretation and arbitrability as any other claim, unless the legislative intent or public policy considerations demonstrate some legal constraint foreclosing the arbitration of a particular statutory claim. The Court then determined that the federal anti-trust claim at issue in *Mitsubishi* was arbitrable, basing its decision almost entirely upon the international nature of the transaction at issue, and recognizing that a different result may occur in a domestic context.

> We now turn to consider whether Soler's antitrust claims are nonarbitrable even though it has agreed to arbitrate them. In holding that they are not, the Court of Appeals followed the decision of the Second Circuit in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (1968). Notwithstanding the absence of any explicit support for such an exception in either the Sherman Act or the Federal Arbitration Act, the Second Circuit there reasoned that "the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make ··· antitrust claims ··· inappropriate for arbitration." *Id.*, at 827-828. We find it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions. As in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), *we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.* *Id.* at 628-29 (emphasis added).

This Court, therefore, did not hold that all anti-trust claims are arbitrable. Rather, it merely held that statutory claims *could* be subject to arbitration if the parties agreed to submit statutory claims to arbitration, and that the international nature of the dispute before it made arbitration particularly appropriate. In other words, the Court held that there was no legal constraint or policy consideration applicable to the federal anti-trust claim that would render it non-arbitrable despite the parties' agreement to arbitrate the claim. The factual allegations and particular contract language at issue in each dispute still must be analyzed to determine if the parties agreed to arbitrate the specific statutory or tort claim alleged.

The Kentucky Court of Appeals recognized the holding of *Mitsubishi* in its analysis. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at pp. 2-3. It recognized that this Court had held that "there is no prohibition to arbitration in cases involving international transactions" and that this Court had also "opened the door" for federal courts to hold that domestic antitrust claims could be arbitrated as well. *Id.* The Kentucky Court of Appeals did not reach the issue of whether there was any legal constraint or policy consideration under Kentucky law that would prohibit the arbitration of state law antitrust claims because there was no need to do so. *Id.* at p. 3. However, the Kentucky Court of Appeals recognized that arbitration agreements are to be enforced like any other contract, *Id.* at pp. 1-2, and other Kentucky courts have specifically found that other Kentucky statutory claims may be compelled to arbitration. *See Oakwood Mobile Homes, Inc.*, 82 S.W.3d at 194; *Hill*, 945 S.W.2d at 951; *Conseco Finance Servicing Corp.*, 47 S.W.3d at 339. The Kentucky Court of Appeals analyzed the scope of the arbitration clause at issue here and determined that the particular claim alleged fell

outside its scope. *Anthem Health Plans of Ky., Inc.*, Nos. 2003-CA-000752-MR, 2003-CA-000753-MR, 2003-CA-000754-MR, at pp. 3.

Kentucky courts have not ruled upon the issue of whether there is a legal constraint or policy consideration under Kentucky law that would prohibit the arbitration of Kentucky antitrust claims. Respondents do not assert, and the Kentucky Court of Appeals did not hold, that all anti-trust claims are non-arbitrable. Rather, every court that has considered the arbitration agreement at issue has concluded that the anti-trust claim alleged in this case is not subject to the arbitration agreement based upon their interpretation and analysis of the specific contract language and factual allegations of the complaint.

Differing results among courts that have considered the arbitrability of anti-trust claims are inevitable because of the highly factual nature of such an inquiry. While it may be true that courts who have considered the issue have recognized that there is generally no legal constraint or policy consideration that would render anti-trust claims nonarbitrable even where the parties agreed to arbitrate such claims, such a determination must be made by each state or their courts as to state law statutory claims. The determination requires an analysis of the state's case law and legislative history relative to the statute under which the claim is being made. Further, an analysis of the particular factual allegations and contract language in each case is still required to determine whether the parties agreed to arbitrate the particular claim and the scope of the arbitration agreement. The result of the courts' analyses of the varying factual situations and varying contract language has produced different results.

For example, in *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (10th Cir. 1995), the court concluded that although the arbitration clause at issue encompassed antitrust claims generally, some of the antitrust causes of action Coors Brewing Company brought against Molson Breweries of Canada Limited were outside the scope of the contract between the two companies. *Id.* at 1516-17. The court held that Coors was entitled to litigate the antitrust claims not related to the licensing agreement containing the arbitration provision "just as anyone else with standing may." *Id.* at 1517. The court recognized that *Mitsubishi* provided no support for categorically concluding that all antitrust claims must go to arbitration. *See Id.* at 1516.

> Although *Mitsubishi* allowed parties to a contract to compel the arbitration of their antitrust disputes, it did not proclaim that all disputes between parties who include an arbitration clause in their contracts are subject to arbitration. A dispute within the scope of the contract is still a condition precedent to the involuntary arbitration of antitrust claims. . . A contrary reading of *Mitsubishi* not only ignores the facts of that case, but also could lead to absurd results. For example, if two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract. In other words, with respect to the alleged wrong, it is simply fortuitous that the parties happened to have a contractual relationship. Similarly, in this case, Coors is entitled to litigate its antitrust claims regarding the Miller-Molson relationship in a public forum so long

as the claims are not related to the licensing agreement. *Id.* at 1516 (internal citation omitted).

Other federal and state courts have similarly found that antitrust claims were not within the scope of the arbitration agreement at issue. *See, e.g., AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 573 (7th Cir. 1999); *Armco Steel Co., L.P. v. CSX Corp.*, 790 F.Supp. 311, 317 (D.D.C. 1991); *Swensen's Ice Cream Co. v. Corsair Corp.*, 942 F.2d 1307, 1350 (8th Cir. 1991). Likewise, courts have determined that specific statutory and tort claims were outside the scope of the arbitration agreements being litigated. *See, e.g., Aiken v. World Fin. Corp. of S.C.*, 623 S.E.2d 873, 876 (S.C. App. 2005) (holding that tort claims for intentional infliction of emotional distress, negligence, and unfair trade practices were not within scope of arbitration agreement relating to loan agreement because the tort claims were independent of the loan agreement); *Loy v. Harter*, 128 S.W.3d 397, 405 (Tex.App. 2004) (holding that tort claim for breach of fiduciary duty was not covered by arbitration provision in employment agreement where claim was independent of employment relationship and could be maintained without reference to the employment agreement); *Cohen v. PaineWebber, Inc.*, 2002 Ohio App. LEXIS 161 (Ohio App. 1st Dist. 2002) (holding that arbitration provision in investment account agreement did not cover torts alleging theft), appeal not allowed 95 Ohio St.3d 1460, *cert. denied* 537 U.S. 974; *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243 (5th Cir. 1998) (holding that Lanham Act false advertising claim was not within the scope of the arbitration agreement).

Petitioner relies upon the Second Circuit Court of Appeals' decision in *JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 167 (2nd Cir. 2004), for its assertion that a

conflict exists between that court and the Kentucky Court of Appeals. However, the similarities between the cases end with the fact that both involve anti-trust claims. The language of the anti-trust provision in *JLM*, which provided that "[a]ny and all differences and disputes of whatsoever nature arising out of this Charter" are subject to arbitration, is substantially different than the arbitration agreement at issue here which requires parties to arbitrate disputes relating to their "business relationship." *See id.* at 172. Further, *JLM* arose in an international, rather than domestic context. Interestingly, the *JLM* court noted that it had previously cautioned against use of the "touch matters" test propounded by Petitioner, finding that " touch matters' and like phrases do not 'yield[ ] a principled way of ··· deciding whether ··· claims should be sent to arbitration.'" *Id.* at 172-73 (internal citation omitted).

JLM establishes nothing more than what Respondents have already stated – whether a particular statutory or anti-trust claim is arbitrable depends upon the specific factual allegations and contract language at issue in each case. Here, the Kentucky and Ohio courts who have considered Respondents' factual allegations and the language of the arbitration agreement have uniformly held that Respondents' anti-trust claim does not fall within the scope of the arbitration provision.

III. Neither The Kentucky Court of Appeals' Alleged Misapplication of the Rule of Law, Nor Petitioner's Dissatisfaction with the Result of the Kentucky Courts' Application of the Test, Are Compelling Reasons to Grant Certiorari

Petitioner's argument is, in essence, a complaint that the Kentucky Court of Appeals reached the wrong result in its application of the rules of arbitrability to the factual

allegations and contract language at issue in this case. Petitioner does not like the result that every court in Kentucky and Ohio who has considered these factual allegations and contract language has reached. However, as demonstrated above, the Kentucky Court of Appeals properly stated the applicable rules of law, and its alleged misapplication of these rules of law is not a compelling reason to grant certiorari.

The determination of whether a claim is within the scope of an agreement to arbitrate is a highly factual analysis. The result is driven by the factual allegations of the complaint and the intent of the parties to the contract containing the arbitration provision. As explained above, there will necessarily be differing results upon application of these rules of law due to the differing factual scenarios presented by each case. Petitioner asks this Court to disregard the findings made by the Kentucky courts, and conduct a *de novo* review of the courts' application of the arbitrability rules to the factual allegations and contract language at issue. Such is not the role of this Court. Because Petitioner presents no question of great federal importance, its petition for a writ of certiorari should be denied.

IV. The Court Has Already Determined That The Question Presented by Petitioner Does Not Merit Review.

Petitioner seeks to have this Court review the findings of the trial court and the Kentucky Court of Appeals which applied federal case law when reviewing the arbitrability of claims and arrived at a decision which is opposed by Petitioner. This precise issue was considered and determined to not merit review by this Court in *UBS PaineWebber, Inc. v. Cohen*, 537 U.S. 974 (2002), when it denied certiorari to the Sixth Circuit case which also correctly applied federal law

to certain claims and found by them to fall outside the scope of those contemplated by an arbitration provision among the parties.

In *Cohen v. PaineWebber, Inc.*, 2002 Ohio App. LEXIS 161 (Ohio App. 1st Dist. 2002), a customer of investment firm PaineWebber agreed to arbitrate "any and all controversies which may arise between me and PaineWebber concerning any account, transaction, dispute or the construction, performance, or breach of this or any other agreement." *Id.* at 3. The customer's estate alleged that the defendants, including PaineWebber, had stolen money from this account. *Id.* at 3-4. The trial court denied PaineWebber's motion to compel arbitration, and the Court of Appeals affirmed, on the ground that, at the time the plaintiff entered into the agreement, the parties never contemplated that the arbitration clause would cover theft. *Id.* at 4-6. The court explained:

A contract requires a "meeting of the minds" as to the terms contained within. At the time that the parties entered into the contract, there was no meeting of the minds that the arbitration provision would cover claims alleging tortious forms of theft. If the parties had contemplated, at the time that they entered into the arbitration agreement, that PaineWebber would possibly steal from Ginsburg, that would surely be against public policy. Matters more likely to have been contemplated by both parties would have involved questions of whether a particular transaction was authorized or whether there was any miscalculation in the sum of money contained in the account. Here, the claims filed by Cohen alleged that [defendants] had engaged in conduct beyond the scope of the brokerage agreement .... Accordingly, under the stated circumstances in this case, we hold that, as a matter of law, the claims of unlawful conversion and fraudulent

concealment, were not subject to the arbitration provision. *Id.* at 9.

The Ohio Court of Appeals' reasoning in *Cohen*, which was affirmed by the Ohio Supreme Court, and also denied certiorari review by this Court, is directly applicable here. Respondents agreed to arbitrate disputes arising out of or relating to its contracts with Petitioner – *i.e.*, breach of contract claims. The parties never contemplated the prospect that Petitioner would unlawfully conspire with other health insurance companies to fix reimbursement rates, anymore than the customer of PaineWebber contemplated the prospect of theft of funds from his account. If unlawful conduct – whether a conspiracy to fix rates or theft – had been contemplated as part of the parties' "meeting of the minds," that would have been contrary to long established public policy (which condemns illegal price-fixing no less than it condemns theft). Thus, Petitioner here, like PaineWebber in *Cohen,* engaged in conduct beyond the scope of the various contracts between the parties, and, as a matter of law, the Kentucky courts found the claims of unlawful price-fixing not subject to the arbitration provision.

The decisions of the Boone County Circuit Court and the Kentucky Court of Appeals correctly applied federal standards of arbitrability in reaching the conclusion that the antitrust claims of Respondents fall outside the scope of the arbitration provisions at issue in this case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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